

No. 2781

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

IN THE MATTER OF THE PETITION OF
THE EQUITABLE TRUST COMPANY OF
NEW YORK, AS TRUSTEE, FOR A WRIT
OF MANDAMUS, TO BE ISSUED AND
DIRECTED TO THE HONORABLE WIL-
LIAM C. VAN FLEET, JUDGE OF THE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALI-
FORNIA, SECOND DIVISION.

BRIEF OF AMICI CURIAE.

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The facts upon which this proceeding arises are set forth in the brief filed by counsel for the Equitable Trust Company, and, therefore, are not recapitulated. The controversy turns on the interpretation of Section 21 of the Judicial Code, and we desire to place before the Court the full legislative history of that section of the Code, as well as the decisions of the State courts dealing with State statutes enacted in pursuance of the rules of policy of which Section 21 is an expression.

Section 21 of the Code provides:

“Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge

before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

The statute was, at the time of its enactment, new to Federal procedure, though legislation had been enacted in various States of the Union similar in purpose. The Judicial Code was adopted in 1911, and became operative in 1912. While the language of Section 21 is clear, it is but proper to interpret the act in the light of the history of the time at which it was passed (*U. S. v. R. R.*, 157 Fed., 618), and, though we are not at liberty to recur to the views of individual Members of Congress expressed in debate, we may look to the proceeding in Congress, for "*the statements of those who had charge of the law*

"made to the legislative body passing it, as to its meaning and purpose are always competent."

Ex parte Farley, 40 Fed., 69;

Johnson v. Southern Pacific, 196 U. S., 19, 20.

LEGISLATIVE HISTORY OF SECTION 21.

When the Judicial Code was reported to the House of Representatives, Section 20 was the only provision embodied in the Code which dealt with the question of the disqualification of judges.

This section was a revision of Sec. 601 R. S., and the form of the statute as reported by the Committee is the same as that in which it now exists. That section being then and now as follows:

"Sec. 20. Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section fourteen."

On December 14, 1910, when the House of Representatives, in Committee of the Whole, was considering the provisions of the Code, Mr. Cullop, of Indiana, suggested that the provisions relating to the

disqualification of judges should be amended so that bias or prejudice should constitute a ground of disqualification, and he further stated that the determination of the question of disqualification should not rest in the hands of the judge whose qualification was disputed. At the close of the discussion Mr. Cullop said:

“I am going to ask permission to add an amendment defining the causes and conditions under which a change of venue shall be granted, and so as to bring that question before the House I am going to ask unanimous consent to have time in which to prepare a provision covering that subject and present it to the House. *I can conceive no greater wrong imposed upon a citizen, however high or humble, than to compel him to submit his cause, an important matter to him, to a court in which he fears justice will not be administered to him. I can conceive of no greater imposition upon any court than to require it to sit, hear, and decide a cause in which it is aware the party litigants have not absolute confidence in his ability or qualification to dispose of it fairly.*

THE SPEAKER pro tempore—The gentleman from Indiana asks unanimous consent to pass for the present the pending section, which is section 20. Is there objection?

There was no objection.”

Congressional Record, Vol. 46, Part 1, page 306, col. 2.

Pursuant to the consent thus given, Mr. Cullop reported his proposed amendment, viz:—Section 21 of the Code.

The amendment originally reported in the House as Section 20a, proposed by Mr. Cullop, read as follows:

"Sec. 20a. Whenever a party to any action or proceeding, civil or criminal, shall file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall set forth reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the time set for the trial or hearing of the case, or good cause be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit."

Congressional Record, Vol. 46, Part 3, page 2626, col. 2.

In presenting the amendment to the House, sitting as a Committee of the Whole, Mr. Cullop said:

"The section that is proposed as section 20a provides that, on the litigant filing the proper affidavit stating the fact that the judge is biased or prejudiced in the case, he shall proceed no further and another judge shall be called, under the provisions of the act, as provided in other cases, who shall hear and determine the case. The affidavit shall state the reasons for the belief that the applicant has for the bias or prejudice of the judge."

Congressional Record, Vol. 46, Part 3, page 2626, col. 2.

In the following colloquy between Mr. Cullop and other Members of the House, Mr. Cullop made clear the purpose of the amendment:

"MR. COX of Indiana—I am partly in favor of the gentleman's amendment, but does he believe that his amendment

will accomplish what he is driving at? In other words, if the amendment is adopted, does the gentleman believe that it will leave it discretionary with the Court?

MR. CULLOP—No; it provides that the judge shall proceed no further with the case. The filing of the affidavit deprives him of further jurisdiction in the case.

MR. COX of Indiana—But the gentleman says in his amendment that every affidavit shall set forth the reasons why. These are mental reasons and exist in the mind of the individual who files the affidavit. Suppose the affidavit sets out certain reasons which may exist in the mind of the party making the affidavit; suppose the judge to whom the affidavit is submitted says that it is not a statutory reason? In other words, does it not leave it to the discretion of the judge?

MR. CULLOP—No; it expressly provides that the judge shall proceed no further. If this affidavit is to be reviewed, it would be by the judge who is called in to succeed him. It does not say that he shall state the facts, but the reasons for the belief that he has that the judge is biased or prejudiced in the case.

Now, this amendment is very essential, in my judgment, for the protection of the courts from criticism. As the matter now stands, a litigant in court has no recourse for relief from the trial judge, but he must submit his case, sometimes feeling, as he may, that the judge is biased and prejudiced and not qualified to sit in the case, but he has no relief whatever. That has provoked, and will continue to provoke as long as the law stands as now, criticism on the court; some of it may be just, some of it may be unjust.

This amendment seeks to remove from the court that criticism, that parties may have relief from judges in whom they have not confidence in their impartiality and freedom from prejudice, so that others may be called to hear and determine the case and avoid the criticism that now exists on the part of litigants in courts in many instances."

In discussing the time at which the affidavit should be filed, it was said:

“MR. BENNET of New York—If in ten days before the date when the case is to be called for trial he files his affidavit, the judge has to go off the bench. If he does not file it prior to that ten days and files it two days before the trial, who is to say whether it is good cause shown or not? The very judge whom he wants to get off the bench because he thinks he is prejudiced?

MR. CULLOP—He must state in his affidavit that the reason for the change was unknown to him before the time that he files it.

MR. BENNET of New York—That is true, but who is to construe the language “for good cause shown”? Suppose the judge says it is not a good cause.

MR. CULLOP—That judge cannot pass upon that question. What judge could say that it was not good cause when a man said he did not know of the existence of the cause before the time he filed his affidavit?

MR. BENNET of New York—Why put the language in at all? Whenever you put language in like that it is open to construction. You make it discretionary, and discretionary to whom? To the very judge whom you want to take off the bench.

MR. CULLOP—*Then if the judge hesitated upon that, it would be the amplest and best reason in the world why he should be considered as not qualified to sit. Nothing could show the disqualification of a judge more than his action in passing upon some question of that kind in order to hold jurisdiction of a suit. His sense of duty would require him to refuse to pass on it.*

MR. BENNET of New York—The gentleman may be quite correct with relation to the abstract proposition, but I assume that what he is aiming at is to give a man an absolute right to take off the bench a judge whom he does not think qualified to try his particular case.

MR. CULLOP—But when he states that he did not know

the existence of the cause sooner, that settles it. That is done, then. There is no review of that cause. That man alone is the arbiter of that question."

Congressional Record, Vol. 46, Part 3, pages 2628, 2629

Viewing the various clauses of the statute in the light of the purpose of the law as declared to Congress by those proposing its enactment, the correct interpretation of the act is made manifest.

The clause of the section requiring the affidavit to state the reasons for the belief that has existed, was not intended to present any judicial question. Concerning this clause the following explanation was given:

MR. MANN—What is the purpose that the gentleman has in mind in requiring that the affidavit shall state the reason?

MR. CULLOP—The reason for the belief that he entertains?

MR. MANN—What is the reason for putting that in, I mean?

MR. CULLOP—I have done that at the suggestion of the committee. It was not my own purpose to do that.

MR. MANN—That is what I wanted to get at.

MR. CULLOP—*It was the suggestion of the committee, that it might correct any abuses that might grow up under this provision.*

MR. MANN—It has been suggested here by members that, under this amendment offered by the gentleman, the judge would have a discretion in passing upon the matter, and he would have the right to examine and ascertain whether the reasons were sufficient. Now, that is plainly not the purpose of the gentleman from Indiana. Is there any reason why it should be left in uncertainty?

MR. BENNET of New York—Not at all.

MR. MANN—When you undertake to say that a man shall file an affidavit of prejudice, and give the reason for his prejudice, is there not some question as to whether that does not permit the judge to pass upon the reasons? Otherwise, what is the object of giving the reason?

MR. CULLOP—No; because the very provision of the statute is that he shall proceed no further. I have no objection to the amendment, but—”

Congressional Record, Vol. 46, Part 3, page 2629.

In reply to some remarks by Mr. Mann, in which that gentleman expressed some fear that the absolute rights given by the amendment might be abused by unscrupulous litigants, Mr. Cullop said:

“None of the numerous objections that the gentleman from Illinois makes are found by experience to exist in the places where this statute has been in use. They are only surmises of the gentleman. There would be no more delay under this statute, or even as much delay, as there is now under the present statute. The present statute is the very reason why parties in suits file applications for continuances and put off the day of trial. Under the present law an unscrupulous litigant can obtain a continuance without any trouble and defer the day of trial. This would be a means to prevent continuances and to expedite the business of the court instead of delaying it, because the man who felt himself dissatisfied with the judge could file his application and be relieved from the jurisdiction of that judge. As it is now, he is driven to file an affidavit for continuance, hoping that perhaps Providence will grant him a change of venue and give him that which the law of his country does not afford, a fair judge before whom to try his case. This will afford him facilities to get another judge, and there will be no trouble, as experience has taught, in procuring another judge to sit in the cause and try the case. I hope the amendment will be adopted.”

Congressional Record, Vol. 46, Part 3, page 2629.

After the discussion above set forth, Section 20a was adopted by the House, the form of the section so adopted being as follows:

"Sec. 20a. Whenever a party or his counsel to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice, either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, and another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed by section twenty-three, to hear such matter. Every affidavit shall state the reason for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit."

Congressional Record, Vol. 46, Part 3, page 2630, col. 1.

In the conference between the representatives of the House and Senate, two amendments were made in Section 20a. The suggested Senate amendments were as follows:

"Section 21. On page 10, in line 13, strike out the words 'or his counsel.' In line 22, before the word 'reason' insert the words *facts and the*. In line 22, after the word 'cause' insert the word *shall*. On page 11, line 2, after the word 'affidavit' insert the words *and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.*"

See Conference Report, 61st Congress, 3rd Sess.,
Doc. No. 848.

The Conference Report submitted by Mr. Moon to

the House, was accompanied by a Statement of the specific changes in matters of substance, made for the purpose of directing attention to all changes of importance. This Statement was read in lieu of the Conference Report (see Cong. Rec., Vol. 46, Part 4, p. 3998), and refers to Section 21 (Section 20a), and mentions as the material change in that section only the provision requiring that the affidavit be accompanied by the certificate of counsel. The change requiring the affidavit to state the facts, as well as the reasons for the belief of the affiant, was not regarded as of sufficient importance to justify a reference thereto (Cong. Rec., Vol. 46, Part 4, p. 4001).

The legislative history of Section 21, and the objects of enacting that statute, as shown by the statements to Congress of those proposing the enactment of the law, demonstrate that the statute was designed to protect litigants from being compelled to submit their cause to a judge whom the litigant believed to be biased. It also appears that there was no intention of permitting the judge whose qualification was challenged to pass upon the question of his own qualification. The very first clauses of the statute declare:

“Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter.”

And, as pointed out by Mr. Cullop:

"MR. COX of Indiana—I am partly in favor of the gentleman's amendment, but does he believe that his amendment will accomplish what he is driving at? In other words, if the amendment is adopted, does the gentleman believe that it will leave it discretionary with the court?

MR. CULLOP—No; it provides that the judge shall proceed no further with the case. The filing of the affidavit deprives him of further jurisdiction in the case.

MR. COX of Indiana—But the gentleman says in his amendment that every affidavit shall set forth the reasons why. These are mental reasons and exist in the mind of the individual who files the affidavit. Suppose the affidavit sets out certain reasons which may exist in the mind of the party making the affidavit; suppose the judge to whom the affidavit is submitted says that it is not a statutory reason? In other words, does it not leave it to the discretion of the judge?

MR. CULLOP—No; it expressly provides that the judge shall proceed no further. If this affidavit is to be reviewed, it would be by the judge who is called in to succeed him."

Congressional Record, Vol. 46, Part 3, page 2626 (bottom), 2627 (top).

Indeed, it seems that the provisions of the statute requiring the reasons why the affiant believes bias to exist were designed to facilitate Congress to remedy abuses arising under the statute, if the same did in fact arise. This is shown by the following dialogue:

"MR. MANN—What is the purpose that the gentleman has in mind in requiring that the affidavit shall state the reason?

MR. CULLOP—The reason for the belief that he entertains?

MR. MANN—What is the reason for putting that in, I mean?

MR. CULLOP—I have done that at the suggestion of the committee. It was not my own purpose to do that.

MR. MANN—That is what I wanted to get at.

MR. CULLOP—It was the suggestion of the committee, that it might correct any abuses that might grow up under this provision.

MR. MANN—It has been suggested here by members that, under this amendment offered by the gentleman, the judge would have a discretion in passing upon the matter, and he would have the right to examine and ascertain whether the reasons were sufficient. Now, that is plainly not the purpose of the gentleman from Indiana. Is there any reason why it should be left in uncertainty?

MR. BENNET of New York—Not at all.

MR. MANN—When you undertake to say that a man shall file an affidavit of prejudice, and give the reason for his prejudice, is there not some question as to whether that does not permit the judge to pass upon the reason? Otherwise, what is the object of giving the reason?

MR. CULLOP—*No; because the very provision of the statute is that he shall proceed no further.*"

Congressional Record, Vol. 46, Part 3, page 2629.

The requirement that the affidavit must be filed ten days before the commencement of the term, or good cause for the delay shown, was not intended to present a justiciable controversy to the judge whose bias was in question. This clearly appears from the discussion between Mr. Cullop and Mr. Bennet, wherein it was said:

"MR. BENNET of New York—Who is to construe the language 'for good cause shown'? Suppose the judge says it is not a good cause.

MR. CULLOP—That judge cannot pass upon that question. What judge could say that it was not good cause when a man said he did not know of the existence of the cause before the time he filed his affidavit?

MR. BENNET of New York—Why put the language in at all? Whenever you put language in like that it is open to construction. You make it discretionary, and discretionary to whom? To the very judge whom you want to take off the bench.

MR. CULLOP—Then, if the judge hesitated upon that, it would be the amplest and best reason in the world why he should be considered as not qualified to sit. Nothing could show the disqualification of a judge more than his action in passing upon some question of that kind in order to hold jurisdiction of a suit. His sense of duty would require him to refuse to pass on it.

MR. BENNET of New York—The gentleman may be quite correct with relation to the abstract proposition, but I assume that what he is aiming at is to give a man an absolute right to take off the bench a judge whom he does not think qualified to try his particular case.

MR. CULLOP—But when he states that he did not know the existence of the cause sooner, that settles it. That is done, then. There is no review of that cause. That man alone is the arbiter of that question."

Congressional Record, Vol. 46, page 2628, page 2629.

Indeed, the conditions prevailing in the country at the time Section 21 of the Code was enacted demonstrated the necessity of increasing, as far as possible, public confidence in the judiciary. At that time various States had proposed constitutional amendments subjecting the judicial branch of the government to recall. Lack of confidence, then widely prevailing among certain classes, threatened the independence of the judiciary, for many people then professed the belief that political liberty could only be assured by destroying the independence of the judiciary. Obviously, it was wise and desirable to enact legislation

calculated to strengthen the faith of the people in the judicial department, and to assure them that the independence of the judiciary might be preserved without danger to the political liberty of the individual. As pointed out by Montesquieu, "Political liberty of the subject is a tranquillity of mind arising from the opinion that each person has of his own safety. In order to have this liberty, it is requisite that the government be so constituted as one man needs not be afraid of another."

D'Alembert Edition, Vol. 1, p. 174.

To assure to the litigant a right to trial before a judge of whose integrity and fairness he had no doubt, was the primary object of the act. Indeed, it should be noted that the conference report in which the enactment of this statute was provided for, also limited in other respects the powers of judges sitting in courts of first instance. The act limiting the power of judges in the issuance of interlocutory decrees enjoining the enforcement of legislative acts was part of this same bill.

FEDERAL DECISIONS INTERPRETING SECTION 21.

Section 21 of the Code came before the United States Supreme Court in the case of *Ex parte American Steel Barrel Company*, 230 U. S., 35. The facts of that case were as follows: The Iron Clad Manufacturing Company was adjudicated a bankrupt on December 2, 1911, the creditors' petition having been filed May 23, 1911. Pending the adjudication of

bankruptcy, the creditors filed a petition charging that the assets of the Steel Barrel Company were in fact the property of the Iron Clad Company and praying an extension of the receivership. This application was bitterly contested. All these proceedings were held before Judge Chatfield, who, on March 15, 1912, refused to extend the receivership to the property of the Barrel Company. Counsel for the creditors requested that the entry of this order be stayed so as to permit them to make a new application. Such new application was made March 29, 1912, and at the same time they filed an affidavit under Section 21. To quote from the opinion:

"That affidavit, in substance, alleged that throughout the proceedings in the case, Judge Chatfield had manifested a strong bias and prejudice against the petitioning creditors and against their counsel, and has shown a strong bias toward Mrs. Elizabeth C. Seaman, who was and is the sole person interested in the subject-matter of the bankrupt corporation's property other than the creditors."

When the matter next came before Judge Chatfield, he made the following order:

"A certain affidavit by Thatcher M. Brown having been brought to the attention of the court, which affidavit was filed after the motion was referred to me by Judge Veeder and before any of the parties appeared before me, in which the said Thatcher M. Brown, as a party to the proceeding, makes an affidavit that I have a personal bias either against the creditors or in favor of the opposite party to the proceeding, and asking that another judge be designated in the manner prescribed in section 20, to hear this motion.

I do hereby, in accordance with the provisions of section

21 of the law known as the Judicial Code, and now in effect, proceed no further in this motion, and order that an authenticated copy of this statement be forthwith certified to the Hon. E. Henry Lacombe, Senior Circuit Judge now present in this Circuit, in order that proceedings may be had under section 14 of said act, it being apparent that this motion cannot proceed under section 23, which is prescribed as an alternative method in said section 21 of said law.

The court further certifies that it does not make an entry upon the records of the court (nor does it admit) that it has any personal bias or prejudice, but on the contrary might call in question many of the statements or controvert many of the allegations contained in said papers. And this court feels that if any disqualification exists it was also present when this court directed a verdict of adjudication and made other decisions in favor of said creditors, and when the judge now holding the court upheld the findings of the special commissioner as to charges of contempt against Mrs. Seaman.

The court, however, feels that the intent of section 21 is to cause a transfer of the case, without reference to the merits of the charge of bias, and therefore does so immediately, in order that the application of the creditors may be considered as speedily as possible by such judge as may be designated."

Thereafter, the affidavit having come before Judge Lacombe, he appointed Judge Mayer to try the cause.

The Steel Barrel Company thereafter petitioned the Supreme Court for a writ of mandamus, directing Judge Chatfield to proceed to decide the cause, a cause which he had heard, on which he had reached and expressed a conclusion, which was not embodied in a judgment only because the affidavit had been filed. The decision of the Supreme Court is contained in the following extract from the opinion:

"Judge Lacombe was clearly called upon to determine in the exercise of his jurisdiction as the Senior Circuit Judge whether the situation was one in which he should designate a judge in the room and place of Judge Chatfield. He determined the matter adversely to the petitioners. If in this he made a mistake, it was one made in the course of the exercise of his legitimate jurisdiction under section 14 of the new Judicial Code, and we cannot compel him through a writ of mandamus to undo what has thus been done. *Ex parte Burtis*, 103 U. S., 238; *In re Parsons*, 150 U. S., 150."

The petitioners contended that Section 21 violated the provisions of the Constitution, and the decision of the Supreme Court necessarily negatives that claim. This is the extent to which the decision in this case goes: It holds that the act of the Senior Circuit Judge in designating a new judge, after there has been presented to him an affidavit purporting to comply with Section 21, is a judicial act. If this be true, the Senior Circuit Judge must, of necessity, be vested with jurisdiction to pass on the sufficiency of the affidavit. The opinion, however, contains several dicta. It is said:

"The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the

pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term."

Much that is here stated is obviously true, but the history of the statute shows that the right of the litigant was not to be restricted by the courts because the facts and reasons set forth in the affidavit did not, in the opinion of a judge, form sufficient basis for the conclusion at which the litigant had arrived. This matter, however, is not here material.

In the opinion it is also said:

"We shall not pass upon the timeliness of the affidavit, nor upon the legal sufficiency of the facts therein stated, as affording ground for the averment that 'personal bias or prejudice' existed. If Judge Chatfield had ruled that the affidavit had not been filed in time, or that it did not otherwise conform to the requirement of the statute, and had proceeded with the case, his action might have been excepted to and assigned as error when the case finally came under the reviewing power of an appellate tribunal. *Henry v. Speer*, 201 Fed. Rep., 869; *Ex parte Fairbank Co.*, 194 Fed. Rep., 978; *Ex parte Glasgow*, 195 Fed. Rep., 780, affirmed by this court in *Glasgow v. Moyer*, 225 U. S., 420."

This is undoubtedly true, but the rule announced affords no basis for the claim that the trial judge is called upon to determine the sufficiency of the excuse for delay in filing the affidavit, or to pass upon the sufficiency of the reasons for the belief that the judge

is prejudiced. Any error, whether it be jurisdictional or not, is susceptible of review on appeal.

The history of the act demonstrates, beyond doubt, that the jurisdiction of the judge of the trial court was confined to determining whether or not the affidavit filed purported to be in formal compliance with the provisions of Section 21.

Indeed, in *Henry v. Speer*, 201 Fed., 869, the Circuit Court of Appeals for the Fifth Circuit said:

“Upon the making and filing by a party of an affidavit under the provisions of section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient, then he has no other or further duty to perform than that prescribed in section 20 of the Judicial Code. He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification.”

Glasgow v. Moyer, 225 U. S., 420, was a proceeding on *habeas corpus*. In that case the petitioner, after conviction by a jury, and pending the hearing of a motion in arrest of judgment, filed an affidavit. The Court, nevertheless, pronounced sentence. This he sought to review by *habeas corpus*. The Court held the proper remedy was appeal, saying:

“The writ of habeas corpus cannot be made to perform the office of a writ of error.” * * *

“The principle is not the less applicable because the law which was the foundation of the indictment and trial is asserted to be unconstitutional or uncertain in the descrip-

tion of the offense. Those questions, like others, the court is invested with jurisdiction to try if raised, and its decisions can be reviewed, like its decisions upon other questions, by writ of error. The principle of the cases is the simple one that if a court has jurisdiction of the case, the writ of habeas corpus cannot be employed to re-try the issues, whether of law, constitutional or other, or of fact.

We have already pointed out that appellant before his trial petitioned this court in habeas corpus, and that his petition was denied on the ground that his proper remedy was by writ of error after trial."

With the exception of the case of *Ex parte Fairbanks*, hereafter considered, the foregoing decisions are the only cases dealing with the interpretation of Section 21.

Many States have similar statutes, and, with few exceptions, the courts have held uniformly that the presentation of the affidavit in form required by statute operated to terminate the judicial power of the judge.

DECISIONS FROM STATES INTERPRETING STATUTES SIMILAR TO SECTION 21.

The Indiana statute, from which the Federal statute was derived, is as follows:

"The court or judge shall change the venue in any civil action upon the application of either party made on affidavit showing . . . bias, prejudice, or interest of the judge."

2 *Rev. Stat.* (1876), 116.

In *Fisk v. Turnpike Co.*, 54 Ind., 479 (1876), the Court said:

"It was the imperative duty of the court to grant the change of venue as prayed by appointing a proper time to hold the trial and calling another judge to try the case. The court had no discretion in the matter. . . . The affidavit was such a one as the affiant had a right to make, and having a right to make it, his motives were not to be impugned. Whatever a person has a right to do in open court according to law he must be allowed to do without having his motives questioned. The affidavit being sufficient, it was the duty of the judge to so adjudge, without taking any further steps in the case."

The following are some of many subsequent cases in Indiana holding that on the filing of such an affidavit the judge must grant the change:

Burkett v. Holman, 104 Ind., 6; 3 N. E., 406;
Woodsmall v. State, 181 Ind., 613; 105 N. E.,
 155 (1914), in which many of the earlier
 cases are reviewed.

In Wisconsin there exists a similar statute, and the rule is the same. *Rines v. Boyd*, 7 Wis., 155.

In Illinois the statute provides that the judge shall award a change of venue on application as therein provided, and requires that the application be verified by the affidavits of two reputable persons.

In *Donovan v. People*, 138 Ill., 602, 28 N. E., 964, the lower court refused to grant the change of venue on the ground of prejudice, notwithstanding the filing of the affidavit, the Court determining that one of the two persons who verified the affidavit was not a rep-

utable person. The Supreme Court reversed this judgment, saying:

"The question is thus presented whether or not an application of the defendant in a criminal case for a change of venue, on account of the prejudice of one or more of the judges of the court in which the case is pending, which conforms to all of the requirements of the statute, can be defeated by counter-affidavits. We think it very clear that this question must be answered in the negative. The petition and the accompanying affidavits comply with the statute and such affidavit purporting to be made by reputable persons, residents of the county, not of kin to the defendant, etc., the right to a change of venue is absolute. The statute nowhere provides for the filing of counter-affidavits in such cases as it does where the ground for the change of venue is the alleged prejudice of the inhabitants of the county. It may be readily seen why such affidavits are allowed in the latter case, but not in the former. In the one case, there being no objection to the impartiality of the judge, he can fairly pass upon the question as to the prejudice of the people on affidavits pro and con; but the question being, is the judge himself prejudiced, there is from the defendant's standpoint no impartial tribunal to weigh the evidence and determine that issue. It is doubtless true that a statutory right to a change of venue is liable to abuse, but that fact confers no power upon courts to limit or qualify the right."

In *Simpson v. Simpson*, 165 Ill. App., 515, the Court said:

"Where the application for change of venue is made on account of the prejudice of the trial judge, the statute gives no discretion, but such judge, if the petition is in proper form and duly verified, must grant the petition and allow the change of venue. After the petition is presented the judge named therein has no power to render any further

order therein, except such as may be made in connection with the one which allows the change of venue."

In Missouri the statute is somewhat similar to Section 21, and limits the right of the party to a single change of judges on the ground of prejudice. In that State it is held that

"Where the application for change is in due form, the judge has no discretion, but must order the cause removed."

State v. Dabbs, 95 S. W., 275.

In Minnesota a similar statute is in force, though there is no limitation on the number of changes which may be obtained. In *State v. Hoist*, 126 N. W., 1090, the Supreme Court of Minnesota said:

"The new law introduces an entirely new feature and its language is plain, direct and positive. It means that the legislature intended that the filing of an affidavit of prejudice with the judge not less than two days before the expiration of the time allowed to prepare for trial, operated of itself, without any other act on the part of either counsel or court, to incapacitate the judge from trying the same."

In North Dakota Section 5454 of the Revised Code, enacted in 1899, provides:

"When either party to a civil action pending in either of the District Courts of the state shall, after issue joined, and before the opening of any term at which the cause is to be tried, file an affidavit corroborated by the affidavit of his attorney in such cause and that of at least one other repu-

table person, stating that there is good reason to believe that such party cannot have a fair and impartial trial of said action by reason of the prejudice, bias or interest of the judge of the District Court in which the action is pending, the court shall proceed no further in the action, but shall forthwith request, arrange for and procure the judge of some other judicial district of the state to preside at said trial in the county of the judicial subdivision in which the action is pending."

In *Orcutt v. Conrad*, 87 N. W., 982, decided in 1901, the Court said:

"Whatever the fact may have been when abstractly considered, it is nevertheless true under the plain reading of the statute that the filing of the required affidavits operated to judicially establish the fact of the existence of bias or prejudice, or both, in the mind of the resident judge with respect to this case, and further operated to oust that judge of all authority to act judicially in this action after the affidavits were filed. The legislature has declared in terms that after the prescribed affidavits are filed 'The court shall proceed no further in the action, but shall forthwith request, arrange for and procure the judge of some other judicial district of the state to preside at said trial in the county of the judicial subdivision in which the action is pending.'

In this case it appears that the defendant has in all particulars complied with the terms of the statute which are obligatory upon her, and having done so it cannot be doubted that she has thereby entitled herself to the benefits of the enactment. . . . As to the single question involved in this case, we think the provisions of the statute are unambiguous and entirely decisive. The language of the law-maker is explicit. When affidavits of prejudice have been filed the mandate of the statute is 'that the court shall proceed no further in the action.' Disregarding this inhibition of the statute, the resident judge has in this case proceeded,

against objections seasonably interposed, to take cognizance of and herein determine an important question arising in the case."

In Oklahoma Section 538 of the Laws, as amended in 1895, provides:

"If it be shown to the court by the affidavit of the accused that he cannot have a fair and impartial trial by reason of the bias and prejudice of the presiding judge . . . a change of judge shall be ordered, and the clerk of the District Court shall immediately transmit to the Supreme Court of the territory a certified copy of the order."

In *Lincoln v. Territory*, 58 Pac., 730, the Supreme Court of Oklahoma construed this statute as being mandatory, and held that on the filing of the affidavit the judge was *ipso facto* disqualified from proceeding further. The Court, in its opinion, p. 732, said:

"Now in this case, under the section of the statutes in question, the only evidence of the facts stated in said affidavit is the affidavit itself, as no one would contend, it seems to us, that in such a case counter-affidavits could be filed or other evidence heard. Then when the affidavit is presented to the court it stands uncontradicted and the only means by which the court could dispute it would be to use his personal knowledge. This would practically make him a judge in his own case, as the allegation in the affidavit is that he, the presiding judge, is biased and prejudiced against the accused. The charge is made against him personally of bias and prejudice. Now would it be reasonable to say the identical person against whom such a charge was made would be a competent tribunal to try and decide that question? *To allow a man to judge of matters in which he is personally interested is not only contrary to the true prin-*

principles of all law, but is repugnant to our ideas of justice, and it seems to us to submit such charge for decision to the judge against whom such prejudice was charged would be to defeat the change of judge in every case where such prejudice actually existed, for, in the language of Judge Brewer, 'All experience teaches that usually he who is prejudiced against another is unconscious of it or unwilling to admit it.'"

See also,

Buckman v. State, 101 Pac., 295 (decided in 1909).

In 1909 the Oklahoma law was amended by the passage of the following act:

"Any party to any cause pending in a court of record may, in term time or in vacation, file a written application with the clerk of the court setting forth the grounds upon which the claims are made that the judge is disqualified, and request him to so certify after a reasonable notice to the other side, same to be presented to such judge, and upon his failure so to do within three days before said cause is set for trial, application may be made to the proper tribunal for mandamus requiring him so to do."

Art. 6, Ch. 24, *Snyder's Comp. Laws of Okla.*

In *Kelly v. Ferguson*, 114 Pac., 631, the Court, in construing the statute of 1909, said:

"It is evident that the statute never intended that a judge should hear evidence and judicially pass upon the question of his own prejudice. Such trial would be almost sure to result in an unseemly contest, just as it did in this case. . . . The facts upon which the claim of prejudice is based must be set out in the original application, so that

the judge and the county attorney may know what is claimed and upon what such claim is based. . . . *We want to make it clear that the trial in cases of this kind does not take place in the lower court. It is illegal and absurd to place a judge on trial before himself. His trial would manifestly be a miserable farce. No man is competent to sit in judgment upon his own conduct or when his individual integrity or feelings are involved. The fact that he assumes that he is competent to do this is conclusive evidence of the fact that he is incompetent to properly discharge this judicial duty. . . . We are therefore of the opinion that respondent should not have attempted to hear testimony and judicially determine the question of his own prejudice. The respondent, however, opened court and placed Honorable George W. Ferguson regularly on trial before himself. . . . It is difficult for us to treat this matter seriously. It sounds more like a joke than it does like a judicial proceeding. It is the first instance that has come to our knowledge in which a judge has placed himself on trial before himself, and we truly hope that nothing of this sort will ever occur again in the State of Oklahoma.*"

In *Cox v. U. S.*, 100 Fed., 293, the Circuit Court of Appeals construed the Oklahoma statute, saying:

"The application of the defendant for a change of judge conforms to the requirements of this statute and the denial of the application by the trial court and the affirmance of this ruling by the Supreme Court of the territory were error. The statute is plain, unambiguous and mandatory. Our attention has been called to a late opinion of the Supreme Court of the territory of Oklahoma—*Lincoln v. Territory* (58 Pac., 730)—in which that court construes the section of the statute we have quoted and holds, and rightly as we think, that when the accused makes affidavit that he cannot have a fair and impartial trial by reason of the bias and prejudice of the presiding judge, it is the duty of the court to order a change of judge to be effected in the

mode provided by the statute, and that a refusal to do so is error fatal on appeal to any judgment the court may thereafter render against the defendant in the cause."

In *Stephens v. Stephens*, 152 Pac., 164, the Supreme Court of Arizona said:

"So far as we have been able to discover, the courts have uniformly held where an affidavit of bias and prejudice is in the language of the statute, the presiding judge can perform no other function in connection with the case other than to make an order that the trial be had before another judge as provided by the statute. The truth of the affidavit filed is not what disqualifies the judge but the affidavit itself."

In *People v. District Court*, 152 Pac., 149, the Supreme Court of Colorado said:

"A change of judge is conditioned not upon the actual fact of his prejudice, but upon the imputation of it. The facts set forth in the recusation must, for the purposes of the motion, be accepted as true, notwithstanding they may be known to the judge and all mankind to be false. The whole matter is left to the conscience of the petitioner and affiants, and when affidavits fulfilling the requirements of the statute are presented, the change must be made and the truth of the matter is not open to question."

We respectfully submit that Section 21 of the Judicial Code should not be interpreted so that any justiciable question of law or fact is presented to the judge whose qualification is assailed.

The statute declares that if any affidavit be filed by a party, charging personal bias or prejudice on the

part of the trial judge, such judge *shall proceed no further in the cause.*

It is true that the statute declares:

(a) The affidavit shall state the fact and reasons for the belief that bias exists.

(b) The affidavit shall be filed ten days before the commencement of the term, or good cause shown for failure to file it within such time.

(c) The good faith of the affiant must be certified by counsel.

These requirements have been made to guard against the abuse of the right conferred. It was never intended to grant to the judge whose qualification was assailed, and whose actual disqualification was conclusively assumed, the right to determine whether the affiant had acted with due diligence in making the attack. Indeed, the person who proposed the act declared that any judge who would assume to act on a question of this character, would thereby establish the very fact of his disqualification.

Of course, the judge must look at the affidavit to see whether or not it is an affidavit filed under Section 21. He must peruse the paper to ascertain:

1. Whether he is charged with personal bias for or against a party.

2. Whether the affidavit has been certified by counsel to have been made in good faith.

3. Whether the affidavit contains a statement of facts and reasons on which the affiant declares that he bases his belief in the prejudice of the judge.

4. Whether the affidavit purports to show an excuse for the delay in filing the same until a day which is less than ten days prior to the commencement of the term if it be not filed before.

But the judge in question cannot:

1. Controvert the fact of bias.

2. Pass upon the truth or sufficiency of the facts and reasons on which the opinion of the affiant is based.

3. Inquire into the good faith of counsel in certifying to the affidavit.

4. Pass upon the legal sufficiency of the excuse set forth in the affidavit as good cause for failure to file the same ten days prior to the commencement of the term.

It was never intended to permit the judge whose fairness was called in question to pass judicially on any question of law or of fact, for the statute expressly declares *that such judge shall proceed no further in the cause.*

In *Murdica v. State*, 137 Pac., 575, the Court held

that the filing of an affidavit of bias prevented the judge from passing on any issue of law or fact, even though that issue arose in connection with another part of the same affidavit, the Court saying:

"We think the trial, as contemplated in the statute under consideration, begins when any controverted question of law or fact is presented to the court for determination."

The duty to pass judicially on any justiciable question arising after the affidavit is filed, devolves on the Senior Circuit Judge.

As said in the Steel Barrel case:

"Judge Lacombe (the Senior Circuit Judge) was clearly called upon to determine in the exercise of his jurisdiction as the senior circuit judge whether the situation was one in which he should designate a judge in the room and place of Judge Chatfield. He determined the matter adversely to the petitioners. If in this he made a mistake, it was one made in the course of the exercise of his legitimate jurisdiction under section 14 of the new Judicial Code, and we cannot compel him through a writ of mandamus to undo what has thus been done. *Ex parte Burtis*, 103 U. S., 238; *In re Parsons*, 150 U. S., 150."

Surely the statute does not contemplate that these questions shall be twice decided judicially, first, by the trial judge, and again by the Senior Circuit Judge. Undoubtedly, Judge Chatfield expressed the correct view when he said:

"The Court further certifies that it does not make an entry upon the records of the Court (nor does it admit) that it has any personal bias or prejudice, but on the con-

trary might call in question many of the statements or controvert many of the allegations contained in said papers."

"The Court however feels that the intent of section 21 is to cause a transfer of the case, without reference to the merits of the charge of bias, and therefore does so immediately, in order that the application of the creditors may be considered as speedily as possible by such Judge as may be designated."

In addition to the obvious and clear purpose of the framers of the act, there is every reason why the statute should be interpreted so as to withdraw from the judge whose bias is in question the duty to decide judicially any question, when as a result of such decision jurisdiction of the case might be retained, for, as pointed out by Judge Brewer:

"All experience teaches that usually he who is prejudiced against another is unconscious of it, or unwilling to admit it,"

and, as said by the Supreme Court of Oklahoma, in *Kelly v. Ferguson*, 114 Pac., 631:

"No man is competent to sit in judgment upon his own conduct or when his individual integrity or feelings are involved. The fact that he assumes that he is competent to do this is conclusive evidence of the fact that he is incompetent to properly discharge this judicial duty."

The Wyoming Act of 1910 provides:

"Sec. 5147. The defendant in a criminal action may make an affidavit stating that he believes he cannot receive a fair trial owing to the bias or prejudice of the judge

or the excitement or prejudice against him in the county; the prosecuting attorney may thereupon traverse by his affidavit the allegations of defendant, except those concerning the bias or prejudice of the judge, and the court or judge shall thereupon set down the issue so presented for trial before him at a stated time, at which times both parties shall present their witnesses, who shall be examined under oath orally, and if it appears to the court or judge, upon such hearing, that the trial would be more impartial in another county, the application shall be granted."

In *Murdica v. State*, 137 Pac., 575, the defendant filed an affidavit, setting up the existence of bias on the part of the judge, and local prejudice in the county. The judge heard and determined the question of local prejudice, and after deciding that question, called in another judge to hear the cause. The Supreme Court reversed the judgment, saying:

"The purpose of the statute is to give the defendant the right to a fair trial before a judge and jury who are neither biased nor prejudiced. The ruling upon a motion for a change of venue, when contested, involves the weighing of evidence and the exercise of a legal discretion, and under the statute the filing of the affidavit for a change of judge alone disqualifies the judge against whom such affidavit is directed from presiding at the trial by reason of an indisputable presumption of bias or prejudice arising from the making and filing of such affidavit. To permit a judge against whom objection has been properly made to preside at the hearing and determine a disputed motion for a change of venue or a continuance might be far more prejudicial than a ruling on the admission of testimony or the giving of an instruction. It is true that the statute gives the defendant the right to file such an affidavit, but we cannot say that the statute should be held for naught because the right or privilege is subject to abuse, but, if

it be so, then the remedy is with the Legislature and not with the courts. It will be observed that by section 5147, upon filing an affidavit objecting to the judge, no traverse to such affidavit is permitted to be filed. In other words, no issue of fact is or can be permitted. No legal discretion is lodged in the court, for the filing and calling the court's attention to such an objection of record disqualifies the judge so objected to from trying the case. It is suggested that the statute is subject to the construction that the judge is disqualified only from presiding at the trial; that the trial begins after the jury is sworn; and that the disqualification goes to the trial or continuance of the case alone and not to preliminary matters leading up to the trial."

"We think the trial, as contemplated in the statute under consideration, begins when any controverted question of law or fact is presented to the court for determination."

In the case of *Ex parte Fairbanks*, 194 Fed., 978, the judge, whose fairness was called in question, undertook to pass judicially on all matters connected with the affidavit. The opinion of the judge in that cause is, we believe, the strongest argument against the practice adopted. The conclusion reached on the questions of law therein discussed, was obviously influenced by the personal feeling aroused by the charge. The decisions in *Henry v. Speer* and the Steel Barrel case render it unnecessary to discuss the opinion. In fact, that decision justifies the observations of the Oklahoma court. Indeed, the opinion in the case of *Ex parte Fairbanks* emphasizes the impropriety of placing upon a judge the burden of passing judicially on any question involved in an issue arising on the question of the qualification of the judge him-

self. Nothing could be more destructive of public confidence in the courts; nothing could more effectually defeat the primary object of the enactment of Section 21.

We submit that the interpretation of Section 21 here contended for is correct, but if it be otherwise,—if the sufficiency of the facts and reasons set forth in the affidavit are subject to review, and the question of the sufficiency of the excuse for not filing the affidavit ten days prior to the commencement of the term may be inquired into by the judge—still, there is no doubt that in this case mandamus should issue. But as these questions are fully discussed in the brief of counsel for the Trustee, we will say nothing further on this branch of the case.

Respectfully submitted.

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